

**DECISION**



**THE COMPTROLLER GENERAL  
OF THE UNITED STATES**  
WASHINGTON, D.C. 20548

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**FILE:** B-210218; B-210218.2

**DATE:** September 30, 1983

**MATTER OF:** Metric Systems Corporation; Command,  
Control and Communications Corporation

**DIGEST:**

1. Agency conducted meaningful negotiations with offeror where it repeatedly brought material deficiencies to offeror's attention during the course of negotiations, and the offeror was specifically requested in its invitation to submit a best and final offer of the specific deficiency which caused its proposal to be substantially downgraded.
2. Protester's best and final offer was properly found technically deficient where it failed to rectify a technical deficiency which was repeatedly brought to protester's attention during negotiations.
3. Where protester's proposal was properly eliminated from consideration because of technical deficiency, GAO need not address protester's objection that it was unfairly evaluated with respect to its past performance record since this could not have materially affected protester's chances for award.
4. Agency improperly downgraded protester for price risk based on government's independent cost estimate where technical evaluation and a specific proposal cost evaluation showed that protester could provide performance at a level equal to the awardee's and at a significantly lower cost.

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5. Small business protester's proposal could be downgraded for a poor past performance record, within the context of explicitly stated criteria, without the necessity for referral to the Small Business Administration for consideration under certificate of competency procedures. However, agency cannot reasonably downgrade offer in this regard as a separate evaluation factor, where the solicitation provides that past performance will be considered within the context of other stated evaluation criteria, and not as an independently rated factor, and the technical evaluation already reflects consideration of past performance in a finding that the protester's offer is technically equal to that of the awardee.
6. Since protester had substantial chance for award but for agency's improper action, proposal preparation costs are recommended.

Metric Systems Corporation (Metric) and Command, Control and Communications Corporation (4C) protest the award of a contract to American Development Corporation (Adcor), under request for proposals (RFP) No. F19628-82-R-0048, a small business set-aside issued by the Air Force for the production of the Intelligence Analysis Center (IAC) for the United States Marine Corps. Adcor was awarded a firm, fixed-price contract for \$17,093,978, covering a base award, plus three options, amounting to \$12,211,349, for a total evaluated price of \$29,305,327.

4C alleges that the Air Force failed to conduct meaningful negotiations with all offerors in the competitive range--in particular, that the Air Force failed to advise 4C of deficiencies and thereby give it an opportunity to rectify these deficiencies--and that the Air Force failed to follow the evaluation criteria for award. Metric alleges it was improperly downgraded for its past performance record and that this amounted to a nonresponsibility determination which should have been referred to the Small Business Administration (SBA) for consideration under certificate of competency (COC) procedures, and that Metric was improperly evaluated and downgraded as having an unrealistically low price.

We find 4C's protest without merit; we sustain Metric's protest.

#### 4C's Protest

The RFP stated that the four specific evaluation criteria were, in descending order of importance: manufacturing/technical, management, cost/price, and logistics. Manufacturing/technical was stated to be significantly more important than the rest of the areas. The RFP also indicated that these four specific criteria would be assessed by the application of six general considerations, which were: understanding the requirements, compliance with requirements, soundness of approach, special technical factors, past performance, and risk assessment. The RFP further indicated that the realism of the proposed price would be evaluated in determining the offeror's understanding of the requirements, compliance with requirements and soundness of approach in the manufacturing/technical, management, and logistics areas. Award was to be made to the responsible offeror whose proposal was most advantageous to the government, price, including options, and other factors considered.

Regarding 4C's allegation of failure to conduct meaningful negotiations, the applicable standard is that the procuring agency must generally furnish information to all offerors within the competitive range concerning the areas of deficiency in their proposals, so that they can revise their proposals to satisfy the solicitation's requirements. Joseph Legat Architects, B-187160, December 13, 1977, 77-2 CPD 458. However, the content and extent of the discussions required under the circumstances are largely matters for determination by the contracting officer, whose judgment will not be disturbed by our Office unless it is clearly without a reasonable basis. Austin Electronics, 54 Comp. Gen. 60 (1974), 74-2 CPD 61.

In this case, after 4C's initial proposal was found to be in the competitive range, 4C participated in a 4-month negotiation process during which it was specifically advised of a variety of proposal deficiencies. In particular, 4C was initially notified of 14 deficiency reports and 21 clarification requests regarding its proposal. Upon receipt of its revised proposal, 4C was advised that 8 deficiency reports remained unresolved, and that 11 clarification requests remained unresolved. Subsequently, 4C participated in 2 days of discussions with the agency during which all remaining proposal deficiencies

and clarifications were discussed and during which 4C was advised of the necessity to resolve all continuing deficiencies. A subsequent 4C submission was evaluated and 4C was advised that three deficiencies, including an unacceptable cable installation plan, remained unresolved. Thereafter, offerors were invited to submit a best and final offer (BAFO), and in 4C's invitation to submit a BAFO, it was notified of the remaining three deficiencies. Evaluation of 4C's BAFO led to an Air Force determination that the deficiency relating to cable installation remained unresolved. Primarily, as a result of this deficiency, 4C was evaluated as having an unsound technical approach which presented technical, schedule and cost risks to the government.

In view of the fact that 4C was consistently apprised of the existence of the particular deficiency to which it points as evidencing the government's failure to conduct meaningful negotiations, we find that the agency's conduct of negotiations was reasonable under the circumstances. To the extent that 4C is merely arguing that, in its view, it submitted a BAFO which adequately addressed the cable installation deficiency, this constitutes a disagreement with the agency assessment of the technical merits of a proposal, which GAO will only question upon a clear showing of unreasonableness, abuse of discretion, or violation of procurement statutes or regulations. Andover Data Services, Inc., B-209243, May 2, 1983, 83-1 CPD 465. However, we will not reevaluate the proposal in question, and the fact that a protester does not agree with an agency's evaluation does not itself render the evaluation unreasonable. Frank E. Basil, Inc.; Jets Services, Inc., B-208133, January 25, 1983, 83-1 CPD 91.

In this instance, 4C was repeatedly advised during the course of negotiations that its cable installation plan was unsatisfactory because it did not propose to remove certain racks which the Air Force felt required removal in order to facilitate the installation. While 4C "clarified" its installation plan in its BAFO, it did so by explaining why it believed that it was unnecessary to remove the racks in question. In our view, the agency was entitled to insist on the methodology which it believed was required to satisfy its minimum needs and, having so advised 4C, it reasonably could downgrade 4C's BAFO for failure to conform to this methodology. Maremont Corporation, 55 Comp. Gen.

1362 (1976), 76-2 CPD 181. We note that the degree of downgrading of the 4C proposal in this regard, while not characterized as a finding that 4C was technically unacceptable, is tantamount to such a finding. In this regard, 4C has argued that such a finding was unwarranted because its proposal had been previously found to be acceptable during the earlier phases of negotiation. We disagree with 4C on this point. The inclusion of 4C's proposal in the competitive range simply indicated that there was a real possibility that it could be improved without major revisions to the point where it became acceptable. Proprietary Computer Systems, Inc., 57 Comp. Gen. 800, 804 (1978), 78-2 CPD 212. Thus, although 4C was included in the competitive range, we note that the particular deficiency in question was consistently drawn to its attention over the course of the negotiations, and we find no evidence that 4C's technical approach in this regard was ever found technically acceptable. Accordingly, the Air Force could reasonably have concluded that 4C's BAFO was technically unacceptable.

With respect to its allegation that the Air Force failed to follow the evaluation criteria, 4C points to the Air Force's evaluation of past performance as having been applied inconsistently to itself and to the awardee. In view of our finding that 4C's proposal properly was found technically unacceptable on other grounds, we need not address this aspect of 4C's protest, since it could not have prejudiced 4C.

#### Metric's Protest

Metric's proposal was found by the source selection authority (SSA) to be substantially equal to Adcor's in all respects except that Metric was found to pose a higher risk because of its past performance record and its lack of price realism. In making this determination, the SSA relied on the findings of the Source Selection Advisory Council (SSAC), which, in turn, were based on the evaluations performed by the Source Selection Evaluation Board (SSEB). Specifically, the SSAC had found, in relevant part, that:

"c. In the Manufacturing/Technical area, offerors B [Metric] and D [Adcor] were evaluated as meeting standards (Blue) with a low risk. The remaining offerors were evaluated as marginal (Yellow) with a high risk.

"d. In the Management area all offerors were evaluated as meeting standards (Blue). Offerors A and C were assessed to have a moderate risk. All other offerors were assessed to have a low risk.

"e. In the Logistics area all offerors were evaluated as meeting standards (Blue) with a low risk.

"f. In the order of lowest to highest BAFO price, the offerors' BAFO prices and GEMPC [Government Estimate of Most Probable Cost] ranges are:

	<u>"BAFO</u>	<u>GEMPC</u>
Offeror A	20.7	20.9 - 22.5
Offeror E	21.0	24.5 - 28.4
Offeror B [Metric]	22.9	22.7 - 23.6
Offeror F	26.9	28.3 - 31.0
Offeror G	27.0	23.0 - 25.2
Offeror C	27.4	25.6 - 29.5
Offeror D [Adcor]	29.3	25.9 - 27.7

"g. The past performance for the offerors and their subcontractors was assessed as satisfactory, except for offerors C and G. Both offerors, C and G, have a history of late deliveries.

"h. Pre-Award Surveys recommended full award for all offerors except C, F, and G which received a no-award recommendation."

In making these findings, the SSAC performed a comparative analysis of the offerors' proposals with respect to all relevant evaluation criteria. The analysis specifically states that it includes not only the proposals, but also the findings of the expanded preaward survey, and offerors' responses during negotiations. The analyses of Adcor's and Metric's proposals were identical with respect to the fact that neither was considered to have any weaknesses in manufacturing/technical, management and logistics, and both were assessed as having low risks with respect to performance schedule and cost within each of the above three criteria areas.

The SSA reached the conclusion that Metric's price was unrealistic and constituted a substantial "risk" because it was substantially below the government's independent cost estimate (ICE). The SSA stated that:

"In making my decision between Metric and ADCOR, I placed substantial emphasis in accordance with paragraph 4.3 of Section M on cost/price realism and credibility and a comparison of the proposed price to the Government's independent cost estimate (ICE). Although all of the offerors' prices were less than the ICE, the amount of the differences varied from \$7 million to \$17 million. The closeness of Metric's price to the prices of two slightly lower offerors did not, in my judgment, establish realism or credibility for Metric's price, since those offerors' proposals did not establish sound understanding and proven capability to perform the IAC contract. In addition, three other offerors' prices were much closer to ADCOR's than to Metric's. While some differences between Metric's price and the \$36 million ICE are understandable, the magnitude of the difference of \$13.1 million compared to a total Metric evaluated price of \$22.9 million, and the concentration of these differences in the important elements of test and program management, caused me to conclude that the Metric price was not realistic and represented substantial schedule and performance risks to the Government and financial risk to Metric. After many years of experience with Government independent cost estimates and the results of contract performance on programs for which such estimates were made, my judgment was and is that the probability of the ICE being \$13 million above a realistic price for sound, timely performance is virtually zero."

Metric argues essentially that the ICE was inaccurate, pointing out that it was repeatedly changed, and that it was prepared for large businesses, which have higher overhead costs, and contends that this inaccuracy is borne out by the prices of the offerors which were, without exception, substantially below the ICE.

In our view, while the RFP did indicate that prices would be compared with the ICE, the RFP did not state that price realism would be judged solely on this comparison. We find that the Air Force's own findings show both that the ICE was inaccurate, and that it found the Metric price was realistic. In particular, the Air Force concedes that the ICE was overstated by \$3 to \$4 million because of overestimated testing requirements. Moreover, as noted above, the SSAC report contains an evaluation of each proposal with respect to its BAFO price compared with the government estimate of most probable cost (GEMPC). Metric's price of \$22.9 million fell within the GEMPC range of \$22.7 to \$23.6 million. The SSAC concluded, as a result, that "the only cost/risk identifiable is in the fact that in the offeror's labor hours his cost may vary in a range of an underestimate of \$.7M to an overestimate of .2M." The SSAC further concluded with respect to the financial risk to Metric that: "Based on the fact that a Firm Fixed Price contract (with Economic Price Adjustment Provisions) will be awarded, and based upon a comparative analysis of the above cited cost risks versus the detailed description of the offeror's financial status provided by DCASMA \* \* \* the financial risk to [Metric] is assessed to be low." The SSAC reached a similar conclusion that the financial risk to Adcor was low. However, Adcor's BAFO price was found to exceed the GEMPC by \$3.4 to \$1.6 million because of overestimates of labor hours.

In addition, as detailed above, the specific evaluation of Metric with respect to the stated evaluation criteria basically contradicts the SSA's conclusion that Metric's price was unrealistic. In this regard, the SSAC evaluated Metric as acceptable, having specifically concluded that it offered a low risk factor in the relevant criteria areas. Having further evaluated Metric's proposal costs as falling within the GEMPC range, the SSAC, in effect, made a finding that Metric offered a plan which was rated equal to that of Adcor's under the evaluation criteria and which was further evaluated to have been based on accurate cost estimates of that plan.

In sum, the Air Force has conceded the inaccuracy of the ICE. Moreover, the SSAC's analysis of the two proposals versus the GEMPC shows that Metric's price fell within the range of the government estimate and was considered to pose a low financial risk. Nevertheless, it appears the SSA's selection placed undue importance on the ICE and gave little consideration to the fact that the



proposals were essentially equal technically and the SSAC rated Metric's cost risk low. In our view, the SSA did not have a reasonable basis for his conclusion that Metric's proposal was significantly worse than Adcor's with respect to cost realism.

Regarding the past performance record, Metric contends that the Air Force finding is, in effect, a nonresponsibility determination which should have been referred to SBA for COC consideration, since Metric is a small business. In this regard, we note that section "L" of the RFP expressly stated:

"EVALUATION OF PAST PERFORMANCE

"Offerors are advised that their past performance on similar contracts will be an evaluation criterion in the evaluation and selection of a source for the IAC acquisition. The relative importance of past performance for any given area, item or factor is as specified in Section M of this RFP. Both general and specific considerations of past performance will be evaluated for each item or factor within an area as specified. General considerations are aspects of past performance considered by the Air Force which are not provided with an offeror's proposal. Specific considerations are those aspects of past performance contained in the offeror's proposal and directly related to the work to be performed.  
\* \* \*."

The Air Force contends that the past performance evaluation did not constitute a nonresponsibility determination and that referral to SBA was not required.

The evaluation criteria make it clear that past performance was included within the evaluation factors and it is permissible to consider responsibility related factors as a measure of the technical acceptability of a proposal in negotiated procurements of this type. New York University, B-195792, August 18, 1980, 80-2 CPD 126. Moreover, we have expressly held that if a small business is found technically deficient under these circumstances the COC procedures are not applicable. Anderson Engineering and Testing Company, B-208632, January 31, 1983, 83-1 CPD 99.

However, we do not think that the SSA could reasonably consider past performance as an independent evaluation criteria in the manner which he appears to have done. That is, all four of the stated evaluation criteria specifically take into consideration past performance as a subfactor. The RFP note regarding past performance quoted earlier also makes it clear that past performance will be considered within each of the four areas, not as a separate criterion. The SSAC evaluation which found the Adcor and Metric proposals essentially technically equal had already taken into consideration the offerors' past performance, as stated in the criteria.

In short, the record shows that the proposals were essentially equal technically, while Metric's price was approximately \$7 million lower than Adcor's. Since 10 U.S.C. § 2304(g) (1982) requires that cost must be accorded some consideration in negotiated procurements, even where price is stated in the evaluation criteria to be of lesser importance than other evaluation criteria, we do not find that the Air Force had a reasonable basis for its decision to award to Adcor. See Wismer and Becker Contracting Engineers et al., B-191756, March 6, 1979, 79-1 CPD 148.

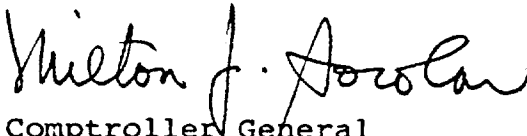
Accordingly, we sustain Metric's protest and deny 4C's protest.

In this situation, we would ordinarily recommend that negotiations be reopened to properly evaluate Metric's proposal, that is, give appropriate weight to the approximately \$7 million cost savings involved, with a view to terminating Adcor's contract and making award to Metric if its proposal was determined superior. However, we do not believe that this would be appropriate under the circumstances here. Adcor has substantially performed the base contract and one of the options has been exercised. In addition, it appears that it may well not be feasible to separately compete the other options in view of the completion of the base contract, since they are interrelated parts of the total IAC package.

However, under the circumstances, we believe that Metric is entitled to recover the costs of preparing its proposal. These costs are recoverable where the government

acted arbitrarily and capriciously with respect to a proposal and the offeror had a substantial chance of receiving the award except for the agency's improper action. See M.L. Mackay & Associates, Inc., B-208827 June 1, 1983, 83-1 CPD 587.

Here, the Air Force unreasonably considered past performance as a separate criterion, and the selection official made findings in this regard which contradict the underlying technical evaluation. In addition, the Air Force downgraded Metric for price risk in the face of a technical evaluation and a specific cost evaluation which showed that Metric could provide performance at a level equal to the awardee's and at a significantly lower cost. In view of the apparent technical equality of the two proposals and the significant cost advantage of Metric's proposal, we believe it is fair to say that Metric had a substantial chance for award. We therefore believe that the protester should be entitled to receive its proposal preparation costs. Metric should submit documentation to support its costs to the agency.

*for*   
Comptroller General  
of the United States